UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RICHARD L. COCHRUN, Plaintiff, v. CAROLYN W. COLVIN, Acting Commissioner of Social Security,[1] Defendant.	CASE NO. C12-2124-MJP-MAT REPORT AND RECOMMENDATION RE: SOCIAL SECURITY DISABILITY APPEAL

Plaintiff Richard L. Cochrun proceeds through counsel in his appeal of a final decision of the Commissioner of the Social Security Administration (Commissioner). The Commissioner denied Plaintiff's application for Disability Insurance Benefits (DIB) and Supplemental Security Income (SSI) after a hearing before an Administrative Law Judge (ALJ). Having considered the ALJ's decision, the administrative record (AR), and all memoranda of record, the Court recommends that this matter be reversed and remanded for further administrative proceedings.

[1] On February 14, 2013, Carolyn W. Colvin became the Acting Commissioner of the Social Security Administration. Therefore, under Federal Rule of Civil Procedure 25(d)(1), Carolyn W. Colvin is substituted for Commissioner Michael J. Astrue as the Defendant in this suit.

FACTS AND PROCEDURAL HISTORY

Plaintiff was born on XXXX, 1978.[2] He did not graduate from high school, and has not received a GED. (AR 37-38.)

Plaintiff filed applications for DIB and SSI on January 14, 2010, alleging a disability onset date of July 15, 2009. (AR 138-43.) The applications were denied, initially and on reconsideration. (AR 69-84.) Plaintiff timely requested a hearing. (AR 85-87.)

On July 12, 2011, ALJ Cheri L. Filion held a hearing, taking testimony from Plaintiff and a vocational expert. (AR 32-64.) On October 26, 2011, the ALJ issued a decision finding Plaintiff not disabled. (AR 17-26.) Plaintiff timely appealed. The Appeals Council denied Plaintiff's request for review on October 11, 2012 (AR 1-4), and Plaintiff appealed this final decision of the Commissioner to this Court.

JURISDICTION

The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

DISCUSSION

The Commissioner follows a five-step sequential evaluation process for determining whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it must be determined whether the claimant is gainfully employed. The ALJ found Plaintiff had not engaged in substantial gainful activity since July 15, 2009, the alleged onset date. (AR

[2] Plaintiff's date of birth is redacted back to the year of birth in accordance with Federal Rule of Civil Procedure 5.2(a) and the General Order of the Court regarding Public Access to Electronic Case Files, pursuant to the official policy on privacy adopted by the Judicial Conference of the United States.

19.) At step two, it must be determined whether a claimant suffers from a severe impairment. The ALJ found Plaintiff's bipolar disorder, and cannabis and alcohol abuse (both in remission) to be severe impairments. (AR 19-20.) Step three asks whether a claimant's impairments meet or equal a listed impairment. The ALJ found that Plaintiff's impairments did not meet or equal the criteria of a listed impairment. (AR 20-22.)

If a claimant's impairments do not meet or equal a listing, the Commissioner must assess residual functional capacity (RFC) and determine at step four whether the claimant has demonstrated an inability to perform past relevant work. The ALJ found Plaintiff capable of performing a full range of work at all exertional levels, but with these non-exertional limitations: he can sustain simple repetitive tasks for at least two hours during an eight-hour workday, he can work with a supervisor and "a few co-workers," and he should avoid working with the general public. (AR 22-25.) With that assessment, the ALJ found at step four that Plaintiff could perform his past relevant work as a window cleaner and shipping receiver/weigher. (AR 26.) The ALJ did not proceed to step five.

This Court's review of the ALJ's decision is limited to whether the decision is in accordance with the law and the findings supported by substantial evidence in the record as a whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means more than a scintilla, but less than a preponderance; it means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989). If there is more than one rational interpretation, one of which supports the ALJ's decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002).

Plaintiff alleges that the ALJ erred in four ways: (1) the ALJ erred in finding that Plaintiff's bipolar disorder did not meet the "paragraph C" criteria for Listing 12.04; (2) the ALJ erred in discounting Plaintiff's credibility; (3) the ALJ gave insufficient reasons to discount the June 2011 opinion of consultative psychologist Lucy Carstens, Ph.D.; and (4) the ALJ did not account for all of Plaintiff's impairments in the RFC assessment. The Commissioner contends that the ALJ's decision is supported by substantial evidence and free from legal error.

Listing 12.04

The ALJ summarily found that Plaintiff did not meet the paragraph C(2) criteria for Listing 12.04, which is met in situations where a qualifying claimant with bipolar syndrome has "a residual disease process that has resulted in such marginal adjustment that even a minimal increase in mental demands or change in the environment would be predicted to cause the individual to decompensate." 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 12.04(C)(2). Plaintiff's counsel's opening statement at the administrating hearing implicitly invoked this section, and Plaintiff himself testified that he believed that the only reason he was doing well at that time was due to his "structured environment where I've taken all the stress out of my life and I'm living it at home with my parents' guidance on almost everything I do. Tell me, you know, everything from meals to stuff around the house. Anything outside of that and I just kind of lose it." (AR 35-36, 44.) That the ALJ did not explain in detail why Plaintiff did not meet Listing 12.04(C)(2) is the basis of Plaintiff's first assignment of error.

While it is true that the use of boilerplate language in step-three findings is legally insufficient, Plaintiff cited no medical evidence to support the argument of counsel or his own

testimony that he met the Listing 12.04(C)(2) criteria. No medical provider indicated that Plaintiff would be expected to decompensate with a minimal increase in mental demands or a change in environment; Plaintiff's citation to Dr. Carstens' January 2011 consultative examination report noting Plaintiff's self-reported "breakthrough" manic episodes despite medication is unavailing for this purpose, because it suggests only that Plaintiff's condition may not be well-controlled by medication, but not that those breakthrough episodes occurred as a result of increased mental demands or a change in environment. (AR 381.)[3]

Because Plaintiff failed to present medical evidence suggesting that he satisfied Listing 12.04(C)(2), any error resulting from the ALJ's use of boilerplate language in the step-three findings is harmless. *See, e.g.*, *Browning v. Astrue*, 2010 WL 1511667, at *6 (D. Ariz. Apr. 15, 2010) (". . . [E]ven if the ALJ's discussion at step three was insufficient as it relates to either the heart or spinal impairments, this error was harmless because . . . the record is devoid of evidence establishing that [the claimant's] impairments met or equaled any listed impairment, and [the claimant] points the Court to none.").

Credibility

Absent evidence of malingering, an ALJ must provide clear and convincing reasons to reject a claimant's testimony. *Lingenfelter v. Astrue*, 504 F.3d 1028, 1036 (9th Cir. 2007). "In weighing a claimant's credibility, the ALJ may consider his reputation for truthfulness, inconsistencies either in his testimony or between his testimony and his conduct, his daily activities, his work record, and testimony from physicians and third parties concerning the

[3] The Court also notes that Plaintiff did not report breakthrough episodes to the providers responsible for managing his medication. *See* AR 388-406 (treatment notes from May 2010 through April 2011).

nature, severity, and effect of the symptoms of which he complains." *Light v. Comm'r of Social Sec. Admin.*, 119 F.3d 789, 792 (9th Cir. 1997).

In this case, the ALJ provided only one reason to discount Plaintiff's credibility — the fact that Plaintiff's bipolar disorder is generally well-controlled with medication, assuming Plaintiff remains sober. (AR 23.) The ALJ asserted that the record shows that Plaintiff's "bipolar exacerbations are connected directly to his failure to use prescribed medication and use of alcohol and marijuana." *Id.* To support that assertion, the ALJ noted that Plaintiff had not had "any significant [manic] episodes since August 2009," since which time he has been medicated and abstained from drug and alcohol use. *Id.* The ALJ also noted that in January 2011, during the time that he was recovering from a knee surgery, he reported that he was not able to be active as a result of the surgery rather than reporting any mental health issues. *Id.* (citing AR 384).

The ALJ's reasoning is not supported by substantial evidence in the record, because the ALJ failed to address evidence that Plaintiff in January 2011 reported "breakthrough" manic episodes that interfered with his functioning, despite medication and sobriety. (AR 380-81.) Though Plaintiff reported these breakthrough episodes to his consultative examiner rather than the treating providers that managed his medications (see AR 401 (December 2010 treatment notes indicating that Plaintiff's bipolar disorder was stable on medications, with no side effects)), Plaintiff explained that discrepancy at the administrative hearing. Plaintiff testified that he is not satisfied with the "level of care" he receives from his medication managers, and that by the time he has sat for hours in the waiting room to be seen by them, he feels irritated and simply provides a minimal amount of information to receive a prescription

refill. (AR 51-54.) Plaintiff also testified at the hearing that he attributes his ability to function to his "structured environment" of living with his parents and trying to eliminate stress from his life. (AR 44.)

The Commissioner concedes that the ALJ's interpretation of Plaintiff's January 2011 comment regarding the effect of his knee surgery was taken out of context (and thus should not have construed it to be inconsistent with his allegations of disabling mental symptoms), but contends that nonetheless the ALJ did not err in finding that there is no evidence that Plaintiff has had a significant manic episode since August 2009. Dkt. 13 at 6-7.

The Commissioner fails to explain why the ALJ's finding remains valid, in light of the evidence that Plaintiff reported breakthrough manic episodes during a January 2011 consultative examination. This is not a situation where there is evidence in the record that could be construed in a number of reasonable ways; in that situation, the Court must determine whether the ALJ's interpretation is one of those reasonable constructions. *See, e.g.*, *Batson v. Comm'r of Social Sec. Admin.*, 359 F.3d 1190, 1193 (9th Cir. 2004). This is a situation where the ALJ asserts a factual statement about the record (*i.e.*, that there is no evidence in the record showing that Plaintiff experienced a significant manic episode since August 2009), but the accuracy of that statement is in dispute: either there is no evidence in the record of a post-August 2009 significant manic episode or there is not.

In light of Plaintiff's report of breakthrough manic episodes in January 2011, and the ALJ's failure to address that evidence, the ALJ's description of Plaintiff's history of manic episodes is not accurate and is therefore not a clear and convincing reason to discount Plaintiff's credibility. *See Lingenfelter*, 504 F.3d at 1036-37 (holding that an ALJ's reason to

discount credibility that is not factually accurate is not a clear and convincing reason to do so). On remand,[4] the ALJ shall reconsider her credibility determination in light of Dr. Carstens' January 2011 evaluation indicating that Plaintiff experiences breakthrough manic episodes even while medicated and sober, and shall develop the record on that issue as necessary.[5]

June 2011 Opinion of Dr. Carstens

Dr. Carstens completed a June 2011 evaluation form regarding Plaintiff's ability to complete work-related activities. (AR 413-14.) She opined that he was "[u]nable to meet competitive standards" in a number of categories and that his impairments would cause him to be absent from work more than four days per month, but also qualified her opinion as based on "limited contact" with Plaintiff. *Id.* The ALJ gave "little weight" to this evaluation, finding that it (1) was inconsistent with Dr. Carstens's three previous evaluations (AR 275-83, 365-87) without an explanation of the dramatic departure, (2) failed to indicate whether the form reflected Plaintiff's abilities on or off medication, and (3) inconsistent with the evidence in the record as a whole. (AR 24.) The ALJ further noted that Dr. Carstens herself "took care" to indicate that her opinion was based on the limited contact of three prior consultative

[4] Though Plaintiff requested a remand for payment of benefits, the Court finds that remand is appropriate because it is not clear that if Plaintiff's testimony were credited, he would be necessarily found disabled. *See Harman v. Apfel*, 211 F.3d 1172, 1178 (9th Cir. 2000). Plaintiff argues that reversing the credibility determination in combination with reversing the rejection of Dr. Carstens' June 2011 evaluation would establish disability (Dkt. 12 at 20), but as explained *infra*, the Court finds that the ALJ's rejection of Dr. Carstens' June 2011 opinion was not erroneous.

[5] The Court also notes that the ALJ purported to credit Dr. Carstens' January 2011 evaluation. (AR 25 (indicating that the ALJ's RFC assessment is supported by, *inter alia*, Dr. Carstens' January 2011 evaluation).)

examinations. (AR 24 (citing AR 414[6]).)

Plaintiff argues that the ALJ's reasoning was insufficient, because the only inconsistency between the previous evaluations and the June 2011 assessment cited by the ALJ is Dr. Carstens' earlier opinion that Plaintiff's prognosis was "fair to good." Dkt. 14 at 6 (citing AR 24). It is true that the ALJ called attention to that discrepancy, but the ALJ also noted that the June 2011 evaluation referenced more severe limitations than noted in the previous evaluations. (AR 24.) For example, Dr. Carstens' January 2011 evaluation noted moderate or severe limitations when Plaintiff was *not medicated*, but the June 2011 evaluation contains no such qualifier. *Compare* AR 381 *with* AR at 413-14. Particularly given that Dr. Carstens did not examine Plaintiff again before rendering her June 2011 opinion, the divergence between the January 2011 opinion and the June 2011 opinion is troubling. *See Tommasetti v. Astrue*, 533 F.3d 1035, 1041 (9th Cir. 2008) (inconsistency with the record properly considered by ALJ in rejection of physician's opinions). Given that Dr. Carstens herself underscored her limited contact with Plaintiff, the ALJ's reasoning in discounting the value of the June 2011 is convincing.

Though Plaintiff suggests that the ALJ should have recontacted Dr. Carstens if she was confused as to whether the June 2011 indicated Plaintiff's limitations with or without medication, the Court does not interpret the ALJ's decision to indicate confusion. The ALJ noted the lack of explanation as a further reason why the June 2011 opinion was given less weight: because Dr. Carstens had previously indicated that Plaintiff experienced more severe

[6] It appears that Plaintiff overlooked Dr. Carstens' typed paragraph at the bottom of page 341, instead focusing only on Dr. Carstens' handwritten notes. *See* Dkt. 14 at 7 (". . . Dr. Carstens never actually states her opinion is based on 'limited contact.'")

limitations when not medicated than when medicated (see AR 368, 381), and because her June 2011 opinion indicated severe symptoms without linking those to lack of medication, the ALJ reasonably interpreted the June 2011 opinion as inconsistent with the earlier opinions. The duty to recontact was not triggered. *See Mayes v. Massanari*, 276 F.3d 453, 459-60 (9th Cir. 2001) ("An ALJ's duty to develop the record further is triggered only when there is ambiguous evidence or when the record is inadequate to allow for proper evaluation of the evidence.").

Dr. Regets' Opinion

Dr. Regets marked a checkbox on the Mental Residual Functional Capacity Assessment (MRFCA) form indicating that Plaintiff was markedly limited in his ability to accept instructions and respond appropriately to criticism from supervisors. (AR 342.) In the narrative portion of the form, Dr. Regets stated that Plaintiff "is able to work with a supervisor and a few co-worker[s], although when experiencing a manic episode may be inappropriate." (AR 343.) State agency consultant Thomas Clifford, Ph.D., reviewed Dr. Regets' evaluation and affirmed it except for the marked limitation as to working with supervisors; Dr. Clifford indicated that this limitation should be rated "moderate" as opposed to "marked." (AR 360.)

The ALJ credited Dr. Regets' opinion except to the extent that he found Plaintiff markedly limited in his ability to work with co-workers. (AR 24.) Plaintiff argues that this finding was erroneous, and that the ALJ should have accounted for this limitation in the Plaintiff's RFC assessment. The Court disagrees: the ALJ properly focused on the narrative portion of Dr. Regets' form. *See* Program Operations Manual System (POMS) DI 25020.010

at B.1 (stating that ALJs should use narrative portion of MRFCA form, not checkbox portion of form, in assessing RFC).[7] Furthermore, Dr. Clifford's partial affirmation of Dr. Regets' opinion specifically addressed the limitation at issue and indicated that it "should note Moderately Limited, not Markedly Limited." (AR 360.) The ALJ did not err in discounting Dr. Regets' opinion as to the supervisor limitation on these grounds.

Dr. Regets also opined that Plaintiff could sustain simple, repetitive tasks "for at least 2hrs of an 8 hr work-day." (AR 343.) The ALJ explained at the administrative hearing that she interpreted that opinion to mean that Plaintiff could perform simple, repetitive tasks in two-hour blocks of time: "If it was only two hours of our eight, clearly, they would have found him to be disabled at an earlier step. I think they meant – that is a mistype, 'at least two hours at a time in an eight hour day.' . . . Otherwise, I – there's no other way to interpret this." (AR 62.) Plaintiff's counsel acquiesced to this interpretation at the hearing. *Id.* The ALJ asked the vocational expert to presume[8] the claimant has the ability to perform simple, repetitive tasks for two-hour segments; the vocational expert testified that the inability to maintain attention for two-hour segments would preclude unskilled work. (AR 60-61.)

The ALJ's written RFC assessment, however, did not contain the clarification that she explained at the hearing: the written decision states that Plaintiff is "capable of sustaining simple repetitive tasks for at least two hours of an eight-hour day[.]" (AR 22.) According to Plaintiff, the written RFC assessment is consistent with Dr. Carstens' June 2011 opinion, and

[7] Although the POMS "does not have the force of law" it "is persuasive authority." *Warre v. Comm'r of Social Sec. Admin.*, 439 F.3d 1001, 1005 (9th Cir. 2006).

[8] The ALJ did not formulate a hypothetical; instead, she asked the vocational expert to review various exhibits in the record and indicate whether the limitations included therein would preclude unskilled work. (AR 59-63.)

should have been adopted as written. Dkt. 14 at 8-9. But, as explained *supra*, the ALJ provided valid reasons to discount Dr. Carstens' June 2011 opinion, and provided further clarification as to her RFC assessment at the hearing (which was accepted by Plaintiff's counsel at that time). Any error resulting from the discrepancy between the written RFC assessment and the RFC discussion at the hearing is harmless, because the record makes clear that the vocational expert understood the ALJ to be presuming an ability to sustain simple, repetitive tasks for two-hour segments of time, and testified that that ability was consistent with unskilled work.

CONCLUSION

For the reasons set forth above, the Court recommends that this matter be REVERSED and REMANDED for further administrative proceedings. On remand, the ALJ shall reconsider Plaintiff's credibility in light of Dr. Carstens' January 2011 report indicating that Plaintiff experiences breakthrough manic episodes even when medicated and sober, and shall develop the record on this issue as necessary. To the degree that this reconsideration implicates the ALJ's findings at steps three and four, the ALJ shall reconsider those findings as well.

DATED this 12th day of June, 2013.

Mary Alice Theiler
United States Magistrate Judge